

CONFERENCE COMMITTEE REPORT DIGEST FOR ESB 259

Citations Affected: IC 5-1-17-9.5; IC 5-1-17-18.5; IC 34-30-2-8.5; IC 36-1-12-13.1; IC 36-1-12-14; IC 36-7-31-14.1.

Synopsis: Stadium funding and contracts. Provides immunity from personal liability and accountability to the members, executive director, officers, and employees of the Indiana stadium and convention building (ISCB) authority for acts authorized by the ISCB authority's enabling statute. Provides conditions under which the ISCB authority may negotiate with a single bidder. Permits the ISCB authority to waive payment bond and performance bond requirements for contracts for capital improvement projects under certain conditions if an adequate alternative is provided. Provides for the termination of the annual capture of \$11,000,000 of state revenue for use to pay obligations owed by the Marion County capital improvement board to the Indiana stadium and convention building authority or a state agency. Provides that after January 1, 2010, the annual capture terminates in the year following the first year when none of the obligations remain outstanding. **(This conference committee report inserts the language concerning waiver of payment bond and performance bond requirements under certain conditions if an adequate alternative is provided.)**

Effective: Upon passage; May 15, 2005 (retroactive); July 1, 2006.

CONFERENCE COMMITTEE REPORT

MADAM PRESIDENT:

Your Conference Committee appointed to confer with a like committee from the House upon Engrossed House Amendments to Engrossed Senate Bill No. 259 respectfully reports that said two committees have conferred and agreed as follows to wit:

that the Senate recede from its dissent from all House amendments and that the Senate now concur in all House amendments to the bill and that the bill be further amended as follows:

- 1 Delete everything after the enacting clause and insert the following:
- 2 SECTION 1. IC 5-1-17-9.5 IS ADDED TO THE INDIANA CODE
- 3 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
- 4 MAY 15, 2005 (RETROACTIVE)]: **Sec. 9.5. The:**
- 5 (1) members of the authority;
- 6 (2) officers and employees of the authority; and
- 7 (3) executive director;
- 8 executing bonds, leases, obligations, or other agreements under this
- 9 chapter are not subject to personal liability or accountability by
- 10 reason of any act authorized by this chapter.
- 11 SECTION 2. IC 5-1-17-18.5 IS ADDED TO THE INDIANA CODE
- 12 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
- 13 MAY 15, 2005 (RETROACTIVE)]: **Sec. 18.5. (a) This section**
- 14 **applies to bids received with respect to a capital improvement**
- 15 **under this chapter:**
- 16 (1) that is constructed by, for, or on behalf of the authority;
- 17 and
- 18 (2) for which only one (1) bid was received from a responsible
- 19 bidder.
- 20 (b) The board may attempt to negotiate a more advantageous
- 21 proposal and contract with the bidder if the board determines that

1 rebidding:

- 2 (1) is not practicable or advantageous; or
 3 (2) would adversely affect the construction schedule or budget
 4 of the project.

5 (c) The board shall prepare a bid file containing the following
 6 information:

7 (1) A copy of all documents that are included as part of the
 8 invitation for bids.

9 (2) A list of all persons to whom copies of the invitation for bids
 10 were given, including the following information:

11 (A) The name and address of each person who received an
 12 invitation for bids.

13 (B) The name of each bidder who responded and the dollar
 14 amount of the bid.

15 (C) A summary of the bid received.

16 (3) The basis on which the bid was accepted.

17 (4) Documentation of the board's negotiating process with the
 18 bidder. The documentation must include the following:

19 (A) A log of the dates and times of each meeting with the
 20 bidder.

21 (B) A description of the nature of all communications with
 22 the bidder.

23 (C) A copy of all written communications, including
 24 electronic communications, with the bidder.

25 (5) The entire contents of the contract file except for
 26 proprietary information included with the bid, such as trade
 27 secrets, manufacturing processes, and financial information
 28 that was not required to be made available for public
 29 inspection by the terms of the invitation for bids.

30 SECTION 3. IC 34-30-2-8.5 IS ADDED TO THE INDIANA CODE
 31 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
 32 MAY 15, 2005 (RETROACTIVE)]: **Sec. 8.5. IC 5-1-17-9.5**
 33 **(Concerning members, officers, employees, and the executive**
 34 **director of the Indiana stadium and convention building authority**
 35 **for acts authorized by law).**

36 SECTION 4. IC 36-1-12-13.1 IS AMENDED TO READ AS
 37 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 13.1. (a) **Except**
 38 **as provided in subsection (f)**, this section applies to contracts for
 39 public work only if the cost of the public work is estimated to be more
 40 than one hundred thousand dollars (\$100,000).

41 (b) The contractor shall execute a payment bond to the appropriate
 42 political subdivision or agency, approved by and for the benefit of the
 43 political subdivision or agency, in an amount equal to the contract price.
 44 The payment bond is binding on the contractor, the subcontractor, and
 45 their successors and assigns for the payment of all indebtedness to a
 46 person for labor and service performed, material furnished, or services
 47 rendered. The payment bond must state that it is for the benefit of the
 48 subcontractors, laborers, material suppliers, and those performing
 49 services.

(c) The payment bond shall be deposited with the board. The payment bond must specify that:

- (1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or
- (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety. The surety of the payment bond may not be released until one (1) year after the board's final settlement with the contractor.

(d) A person to whom money is due for labor performed, material furnished, or services provided shall, within sixty (60) days after the completion of the labor or service, or within sixty (60) days after the last item of material has been furnished, file with the board signed duplicate statements of the amount due. The board shall forward to the surety of the payment bond one (1) of the signed duplicate statements. However, failure of the board to forward a signed duplicate statement does not affect the rights of a person to whom money is due. In addition, a failure to forward the statement does not operate as a defense for the surety.

(e) An action may not be brought against the surety until thirty (30) days after the filing of the signed duplicate statements with the board. If the indebtedness is not paid in full at the end of that thirty (30) day period the person may bring an action in court. The court action must be brought within sixty (60) days after the date of the final completion and acceptance of the public work.

(f) This subsection applies to contracts for a capital improvement entered into by, for, or on behalf of the Indiana stadium and convention building authority created by IC 5-1-17-6. The board awarding the contract for the capital improvement project may waive any payment bond requirement if the board, after public notice and hearing, determines:

(1) that:

(A) an otherwise responsive and responsible bidder is unable to provide the payment bond; or

(B) the cost or coverage of the payment bond is not in the best interest of the project; and

(2) that an adequate alternative is provided through a letter of credit, additional retainage of at least ten percent (10%) of the contract amount, a joint payable check system, or other sufficient protective mechanism.

SECTION 5. IC 36-1-12-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 14. (a) This section applies to public work contracts in excess of one hundred thousand dollars (\$100,000) for projects other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way. This section also applies to a lessor corporation qualifying under IC 21-5-11 or IC 21-5-12 or any

other lease-back arrangement containing an option to purchase, notwithstanding the statutory provisions governing those leases.

(b) A board that enters into a contract for public work, and a contractor who subcontracts parts of that contract, shall include in their respective contracts provisions for the retainage of portions of payments by the board to contractors, by contractors to subcontractors, and for the payment of subcontractors. At the discretion of the contractor, the retainage shall be held by the board or shall be placed in an escrow account with a bank, savings and loan institution, or the state as the escrow agent. The escrow agent shall be selected by mutual agreement between board and contractor or contractor and subcontractor under a written agreement among the bank or savings and loan institution and:

(1) the board and the contractor; or

(2) the subcontractor and the contractor.

The board shall not be required to pay interest on the amounts of retainage that it holds under this section.

(c) To determine the amount of retainage to be withheld, the board shall:

(1) withhold no more than ten percent (10%) of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) completed, and nothing further after that; or

(2) withhold no more than five percent (5%) of the dollar value of all work satisfactorily completed until the public work is substantially completed.

If upon substantial completion of the public work minor items remain uncompleted, an amount computed under subsection (f) of this section shall be withheld until those items are completed.

(d) The escrow agreement must contain the following provisions:

(1) The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent.

(2) The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same proportion of then escrowed income to the person specified in the notice.

(3) The escrow agent shall be compensated for the agent's services. The parties may agree on a reasonable fee comparable with fees being charged for the handling of escrow accounts of similar size and duration. The fee shall be paid from the escrowed income.

The escrow agreement may include other terms and conditions consistent with this subsection, including provisions authorizing the escrow agent to commingle the escrowed funds with funds held in other escrow accounts and limiting the liability of the escrow agent.

(e) **Except as provided by subsection (i),** the contractor shall furnish the board with a performance bond equal to the contract price. If acceptable to the board, the performance bond may provide for

incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the contract price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

- (1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or
- (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety.

(f) The board or escrow agent shall pay the contractor within sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter. Payment by the escrow agent shall include all escrowed principal and escrowed income. If within sixty-one (61) days after the date of substantial completion there remain uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. Required warranties begin not later than the date of substantial completion.

(g) Actions against a surety on a performance bond must be brought within one (1) year after the date of the board's final settlement with the contractor.

(h) This subsection applies to public work contracts of less than two hundred fifty thousand dollars (\$250,000). The board may waive the performance bond requirement of subsection (e) and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions instead of a performance bond. Subsections (e) through (g) apply to a letter of credit submitted under this subsection.

(i) This subsection applies to the Indiana stadium and convention building authority created by IC 5-1-17-6. The board awarding the contract for a capital improvement project may waive any performance bond requirement if the board, after public notice and hearing, determines:

(1) that:

(A) an otherwise responsive and responsible bidder is unable to provide the performance bond; or

(B) the cost or coverage of the performance bond is not in the best interest of the project; and

(2) that an adequate alternative is provided through a letter of credit, additional retainage of at least ten percent (10%) of the contract amount, a joint payable check system, or other sufficient protective mechanism.

SECTION 6. IC 36-7-31-14.1, AS ADDED BY P.L.214-2005, SECTION 69, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 14.1. (a) The budget director

appointed under IC 4-12-1-3 may determine that, commencing July 1, 2007, there may be captured in the tax area up to eleven million dollars (\$11,000,000) per year in addition to the up to five million dollars (\$5,000,000) of state revenue to be captured by the tax area under section 14 of this chapter, for up to thirty-four (34) consecutive years. The budget director's determination must specify that the termination date of the tax area for purposes of the collection of the additional eleven million dollars (\$11,000,000) per year is extended to not later than:

(1) January 1, 2041; or

(2) January 1, 2010, if on that date there are no obligations owed by the capital improvement board of managers to the Indiana stadium and convention building authority or to any state agency under IC 5-1-17-26.

Following the budget director's determination, and commencing July 1, 2007, the maximum total amount of revenue captured by the tax area for years ending before January 1, 2041, shall be sixteen million dollars (\$16,000,000) per year.

(b) The additional revenue captured pursuant to a determination under subsection (a) shall be distributed to the capital improvement board or its designee. So long as there are any current or future obligations owed by the capital improvement board to the Indiana stadium and convention building authority created by IC 5-1-17 or any state agency under a lease or another agreement entered into between the capital improvement board and the Indiana stadium and convention building authority or any state agency under IC 5-1-17-26, the capital improvement board or its designee shall deposit the additional revenue received under this subsection in a special fund, which may be used only for the payment of the obligations described in this subsection.

(c) Notwithstanding the budget director's determination under subsection (a), after January 1, 2010, the capture of the additional eleven million dollars (\$11,000,000) per year described in subsection (a) terminates on January 1 of the year following the first year in which no obligations of the capital improvement board described in subsection (b) remain outstanding.

SECTION 7. **An emergency is declared for this act.**

(Reference is to ESB 259 as reprinted March 1, 2006.)

Conference Committee Report
on
Engrossed Senate Bill 259

Signed by:

Senator Kenley
Chairperson

Representative Espich

Senator Hume

Representative Crawford

Senate Conferees

House Conferees